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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1963-4

Nos. 849, 850, 851

No. 849

INLAND EMPIRE BUILDERS, INC., *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

No. 850

(Consolidated Appeals)

HEBB AND NARODICK, *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

No. 851

IAN MURRAY, *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
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MOTION TO DISMISS

COME NOW the appellees in each of the above-entitled proceedings and respectfully move to dismiss each of the above-entitled appeals in accordance with Rule 16 of the Rules of the United States Supreme Court on the ground that these cases do not present a substantial federal question.

Introductory Comment

Each of the above-entitled proceedings involves identical facts, identical records and identical judgments.

The following motion to dismiss is therefore directed to the jurisdictional statements filed by each of the appellants in each of the above-entitled appeals.

QUESTION PRESENTED

Are corporations "federal instrumentalities" for purposes of enjoying immunity from state taxation under the following circumstances:

1. The corporations are formed by appellants (private contracting companies) as a part of the financing arrangements made by the appellants to enable the appellants to construct Capehart housing and be paid for such construction.

2. The corporations are chartered in Delaware, and qualified to do business in the State of Washington; and persons associated with the appellant-companies are the incorporators, officers and sole stockholders of the corporations.

3. The corporations lease federal lands from the United States, mortgage the leasehold interest to private financial institutions to secure the corporations' notes to such institutions in order to obtain funds from such institutions to pay for the construc-

For reasons explained hereinafter (*Infra*, page 17) no other question can possibly be said to be presented by these appeals although each of the appellants assert that these appeals also present the question of whether the retail sales herein involved are actually sales to the United States as such. (No. 849, Juris. St., p. 4; No. 850, Juris. St., p. 3; No. 851, Juris. St., p. 3.)

tion of the housing, such private sources of funds having previously been arranged for by the appellants themselves, rather than the United States.

4. The corporations enter into a housing contract with the United States and the appellants, and pursuant to this contract disburse the proceeds of the mortgage loans to the appellants to pay for the cost of construction, including appellants' profits.

5. As the housing is completed on the leased lands, the United States assumes control and assigns occupancy of the individual units of housing to families of military personnel.

6. The federal government guarantees to the private lender the repayment of the mortgage loan made to the corporations, and, after completion of construction, makes the payments on the mortgage loan by diverting the "family quarters allowances" otherwise payable to military personnel who occupy the housing.

7. The United States acquired all of the stock of the corporations when the appellants have completed construction of the housing, such stock having been placed in escrow prior to the start of construction.

COUNTERSTATEMENT OF THE CASE

Introductory Comment

Although the actual facts in each proceeding are identical, and although the cases were tried as consolidated proceedings before the trial court, and

although a single decision of the Washington State Supreme Court is involved in these appeals, the appellants have each offered a different statement of facts.

The following statement of facts is offered in order to show, as clearly and objectively as possible, and on a step-by-step basis, exactly what happens when Capehart Act housing is constructed. This should diminish the need of this Court's having to piece together, from three different statements of fact, a clear understanding of a very complicated series of transactions. This should also relieve appellees from taking individual exception to a number of irrelevancies and omissions in the three statements offered by the appellants.

In order to resolve differences in the numbering of the lower court's records in each of the above-referenced appeals, transcript references in this motion are made to the record in Cause No. 849, *Inland Empire Builders, et al. v. The State of Washington*. Appellees' transcript references are made primarily to the findings of fact which are identical in each case. (No. 849, Tr. 0018-0038; No. 850, Tr. 0024-0044; No. 851, Tr. 0051-0068.) In addition to references to the trial court's findings of fact, appellees will refer to the exhibits which are identical in each case. Since the pages of the exhibits are not numbered, but are in each case appended to the last page of the transcript of record, reference to exhibits will be made only to "Exhibit Number 1", etc.

INITIAL FINANCING ARRANGEMENTS AND ORGANIZATION OF THE MORTGAGOR-BUILDER CORPORATIONS

The first step in the procedure required for construction of Capehart housing for families of military personnel is the determination by the Secretary of Defense that there is a need for family housing in a particular area.

The Secretary of Defense made a determination of the necessity of construction of family housing in each of the localities herein involved. Thereafter, an "Advance Notice" was issued by the United States indicating that bids would soon be invited for construction of Capehart Act projects. Thereafter, an "Invitation for Bids" (Ex. 1) was issued by the United States, inviting bids from appellants and other builders for construction of Capehart housing projects which, if approved, would require the successful "builder" to take the following four "actions":

> " * * * first, to form a new corporation (hereinafter called the 'mortgagor-builder'); second, to arrange financing for total cost of the Project, including profit, by a Building Loan Agreement between the mortgagor-builder and a mortgage lender (hereinafter called the 'mortgagee'); third, to cause the mortgagee to obtain the Commissioner's Commitment for Insurance; and fourth, to execute a three-party Housing Contract which defines the rights and obligations of the Department, the eligible builder and the mortgagor-builder. * * *" (Ex. 1, IB-1). (Finding of Fact IX, Tr. 0026).

Accordingly, each of the appellants, in response to the invitation for bids for each respective project, submitted its bid to the United States (Ex. 2), which bid was accepted by a "Letter of Acceptability" (Ex. 3) from the United States.

As required by the letter of acceptability, and prior to execution of the housing contracts, leases, mortgages and other documents of the "initial closing" hereinafter described, each appellant caused the mortgagor-builder corporations to be chartered as private corporations (Ex. 4, Article Third) in the State of Delaware and to be qualified to do business in the State of Washington (Ex. 4). (Finding of Fact XI, Tr. 0026.)

As required by the letter of acceptability, sources of private capital were obtained by the appellants to finance the mortgagor-builder corporations, the loan to be secured by the mortgage of the mortgagor-builder corporations's leasehold interest (Ex. 10), FHA insurance and a guaranty of the Secretary of Defense (Ex. 16). It was understood and agreed by the appellants that the proceeds of such mortgage loans to the mortgagor-builder corporations were to be paid out by the mortgagor-builder corporations for all the costs of the entire undertaking, including payments to the appellants for the cost of construction and appellants' profit in each of the projects, and incidental costs. (Ex. 1, para. 1(e)). (cf. Finding of Fact XIV, Tr. 0028.)

As required by the letter of acceptability, a Commitment for Insurance from the Federal Hous-

ing Commissioner, insuring the loans to be extended to the mortgagor-builder corporations by the private lender, was obtained. The Commitment for Insurance was addressed to the lending institution, the mortgagor-builder corporation, and the appellants (Ex. 5). (Finding of Fact XV, Tr. 0028.)

No instrument or evidence of indebtedness was ever executed in any of these proceedings showing a direct indebtedness of the United States to the appellants (See Ex. 16, & Ex. 1, para. 1(e)). (cf. Finding of Fact XXIV, Tr. 0034.)

DESCRIPTION OF UNDERTAKINGS REQUIRED OF APPELLANTS, MORTGAGOR-BUILDER CORPORATIONS, MORTGAGEE INSTITUTIONS AND THE UNITED STATES.

In each project the appellant contractors, the respective mortgagor-builder corporations, the United States government, representatives of the Federal Housing Administration, and representatives of the lending organizations proceeded to execute various documents required by law and described in the Letter of Acceptability in a series of transactions referred to by the parties as the "initial closing" (Finding of Fact XVI, Tr. 0029).

At each of the respective "initial closings," the following documents, among others, were executed all on the same day:

1. A lease was executed by the United States, as lessor, leasing the premises upon which the respective projects were to be constructed to the

respective mortgagor-builder corporations as lessees (Ex. 6). The United States gave a receipt for the lease payment (Ex. 7).

2. Under this lease, the mortgagor-builder corporation, during the period of construction, was to maintain at its own cost and expense such insurance as was required by the Commissioner (para. 8, Ex. 6), and was obligated to indemnify the United States from any claims for damages or injuries to persons present upon the leased premises as invitees or licensees of the lessee mortgagor-builder corporation (para. 9, Ex. 6). The lessee was also obligated to save the military department harmless from laws, ordinances and regulations applicable to the leased premises with regard to construction, sanitation, licenses or permits to do business (para. 11, Ex. 6), until such time as the United States became the sole stockholder in the lessee mortgagor-builder corporation.

3. The respective appellants and the mortgagor-builder corporation for the particular project and the United States government executed a "housing contract" (Ex. 8). This contract provided, *inter alia*, that the appellants should complete the specified construction and that the mortgagor-builder corporation would pay the appellants the agreed price for completion of the contract (Art. I, para. 1(e); Art. III, para. 4, Ex. 8).

4. The mortgagor-builder corporations and the respective private lenders executed "building loan agreements" (Ex. 12), under which the private lend-

ers agreed to loan the mortgagor-builder corporation funds necessary for payment of the appellants.

5. The mortgagor-builder corporation executed a mortgage note as promisor to the private lender as promisee (Ex. 9).

6. The mortgagor-builder corporation executed a real and chattel mortgage in favor of the private lender as mortgagee (Ex. 10).

7. The officers and stockholders of the mortgagor-builder corporation executed assignments of their stock and resignations as officers to be placed in escrow pending final closing after completion of construction (Ex. 11).

8. The appellants, the respective mortgagor-builder corporations, and a corporate surety organization executed a dual obligee Federal Housing Administration payment bond by which the appellants and their corporate surety as obligors assured the "mortgagor-builder" and each respective mortgagee as obligees that the obligors would complete the "housing contract" subject to various conditions set forth therein (Ex. 13). The United States was not an obligee of the payment bonds.

9. In each transaction, the appellants and a corporate surety, as principals, executed a performance bond to the respective mortgagor-builder corporations and each respective mortgagee as obligees (Ex. 13-A). The United States was not an obligee of the performance bonds.

10. In each transaction, each respective mortgagor-builder corporation agreed to hold each respective mortgagee harmless as to real and personal property taxes on the premises during construction (Ex. 15). The payment by the mortgagor-builder corporation of its obligation under this instrument was in turn guaranteed by the United States (Ex. 17).

11. The Secretary of the particular branch of the Armed Forces at whose installation the projects were to be constructed, executed for the United States a guaranty with respect to mortgage payments (Ex. 16). The guaranty executed by the United States was to the mortgagee only. The guaranty was executed by the United States pursuant to conditions prescribed by the "Capehart Act".

12. The stock and resignations of the officers of the mortgagor-builder corporation were placed in escfow with the mortgagee, for delivery to the United States after completion of construction (Ex. 11).

PROCEDURES DURING CONSTRUCTION

In accordance with the building loan agreement (Ex. 12), the mortgagees loaned to each respective mortgagor-builder corporation the specific amount of the bid price for construction of each specific project (Ex. 9). (cf. Finding of Fact XVIII, Tr. 0031.)

During construction of each of the projects involved herein, the appellants received progress payments as portions of the work were completed. Progress payments were made to the appellants by the

mortgagee-lender on behalf of the mortgagor-builder corporation out of the loan proceeds (Ex. 8, Art. III, IV; Ex. 1, para. 1(e)). (cf. Finding of Fact XIX, Tr. 0032.) Applications for such advances from the mortgage loan proceeds were made by the mortgagor-builder corporation and the appellants on FHA Form 2403 (Ex. 25), subject to approval of the mortgagee and contracting officer (Finding of Fact XIX, Tr. 0032).

PROCEDURES AFTER CONSTRUCTION

1. As units within the projects were completed, they were made available to the appropriate branch of the Defense Department for occupancy by military personnel (Finding of Fact XX, Tr. 0033).

2. Upon completion of construction of each project a "notice of final acceptance" with respect to each project was executed by the inspecting officials of the appropriate branch of the Military; whereupon, pursuant to the provision of the housing contract, the payment of the retained percentages was made to the appellants. (Finding of Fact XXI, Tr. 0034.)

3. After final completion of the projects, the United States acquired all stock in the mortgagor-builder corporations. At the same time as the project was accepted, the entire capital stock of the mortgagor-builder corporation and the resignation of its officers previously placed in escrow were delivered to the United States under the terms and conditions of the escrow agreement (Ex. 11). (Finding of Fact XXII, Tr. 0033.)

Under the Capehart Act, the units were occupied by military personnel and their dependents, whose "quarters' allowances", or sums in lieu thereof, were paid to the mortgagees of each project to retire the mortgage loans made to each respective mortgagor-builder corporation. (See 42 U.S.C. 1594(d)(b) and Ex. 1, para. 1). These payments are made pursuant to the guaranty made by the United States to the mortgagee-lendee.

Summary of Facts

Each Capehart transaction involved four parties: (1) a contractor-builder (appellants); (2) a "mortgagor-builder corporation" (organized by the contractor-builder at the request of the United States); (3) a mortgagee (insurance company, bank or private lender which supplied private capital); and (4) the United States.

The illustration (fold-out, opposite page) is offered to assist the Court by summarizing the role of each party to each Capehart transaction involved in these proceedings.

1. CONTRACTOR (APPELLANTS) (KR)	2. MORTGAGOR-BUILDER CORPORATION (MBC)	3. MORTGAGEE-L
Submits bid		
Organizes MBC	Chartered in Delaware, qualified in Washington	
Arranges for private financing of Capehart project by Building Loan	Enters into Building Loan Agreement	Enters into Building Loan Ag bid price
	Enters into lease of realty on which Capehart project is to be built	
Receives Commitment for mortgage insurance from FHA	Receives FHA Commitment for Mortgage Insurance	Receives Commitment for mort
	Executes mortgage note to MEE	Receives mortgage note from
	Executes mortgage, securing mortgage note by mortgage on leasehold	Receives mortgage from MBC
Enters into Housing Contract with MBC and US	Enters into Housing Contract with KR and US	
		Receives from US Guaranty o
	Puts resignations of officers and corporation stock in escrow with MEE for later delivery to US	Receives resignations and stoc later delivery to US
Executes, as principal, performance and payment bonds with bonding companies as sureties	Is obligee on payment and performance bonds	Is obligee on payment and perf
Performs construction		
Receives payment as work progresses out of loan proceeds	Receives portions of loan proceeds from MEE, for payment over to KR, as work progresses	Advances to MBC portions of over to KR, as work progress
Receives final payment, in same manner as before, when project is completed	Receives final portions of loan proceeds for payment to KR	Makes final advances of loan manner as before
		Takes stock of MBC and resig escrow; delivers to US
		Receives payment on mortgag

ILDER CORPORATION (MBC)	3. MORTGAGEE-LENDER (MEE)	4. FEDERAL GOVERNMENT (US)
		Determines necessity for military housing; invites bids for construction of Capehart housing
		Issues Letter of Acceptability
qualified in Washington		
an Agreement	Enters into Building Loan Agreement to loan MBC the bid price	
y on which Capehart		Executes lease to MBC for realty on which Capehart project is to be built
ent for Mortgage Insurance	Receives Commitment for mortgage insurance from FHA	Through FHA, gives Commitment for mortgage insurance
to MEE	Receives mortgage note from MBC	
iring mortgage note by mortgage	Receives mortgage from MBC	
ntract with KR and US		Enters into Housing Contract with MBC and KR
	Receives from US Guaranty of payment of mortgage note	Executes Guaranty of payment of mortgage note to MEE
icers and corporation stock in ater delivery to US	Receives resignations and stock as escrow holder for later delivery to US	
nd performance bonds	Is obligee on payment and performance bonds	
		Inspects and supervises construction
n proceeds from MEE, for payment ogresses	Advances to MBC portions of loan proceeds, for payment over to KR, as work progresses	Approves progress payment to KR and accepts units as completed
f loan proceeds for payment to KR	Makes final advances of loan proceeds to MBC, in same manner as before	Accepts housing project and gives notice of final acceptance; approves final payments
		Through FHA, makes final endorsement of mortgage note FHA insurance takes effect
	Takes stock of MBC and resignations of officers out of escrow; delivers to US	Receives stock of MBC and resignations of MBC officers from MEE
	Receives payment on mortgage note from US	In accordance with Guaranty of payment of mortgage note, begins payment of note out of funds diverted from military quarters allowances

THE APPEALS DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

I.

WHETHER OR NOT THE UNITED STATES IS THE "BUYER" IS ESSENTIALLY A QUESTION OF STATE LAW AND NOT A FEDERAL QUESTION PRESENTED BY THESE APPEALS

A. Summary of Washington Statutes

Each of the appellants has been assessed for sales taxes imposed by chapter 82.08 of the Revised Code of Washington.

RCW 82.08.020 provides in pertinent part:

> "There is levied and there shall be collected a tax on each retail sale in this state * * *" (Emphasis supplied.)

RCW 82.08.050 provides in pertinent part:

> "The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax * * *
>
> "In case any seller fails to collect the tax herein imposed * * * he shall, nevertheless, be personally liable to the state for the amount of the tax."

RCW 82.08.120 provides that the tax must be added to the sales price and cannot be absorbed by the seller.

RCW 82.08.010(1) defines "selling price" as follows:

> "'Selling price' means the consideration, whether money, credits, rights, or other prop-

erty, expressed in the terms of money, paid or delivered by a buyer to a seller, * * *"

RCW 82.04.050 defines "retail sale" as follows:

"'Sale at retail' or 'retail sale' means every sale of tangible personal property (including articles produced, fabricated or imprinted) * * *

"* * * (b) the *constructing*, repairing, decorating, or improving of *new or existing buildings or other structures under, upon, or above real property of or for consumers*, * * *" (Emphasis supplied.)

RCW 82.04.190(4) defines the term "consumer" as follows:

"Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, * * *"

RCW 82.08.010 makes applicable to the sales tax law, chapter 82.08 RCW, the definition of "consumer" quoted above.

B. Analysis of Washington Law

One of the key issues presented to the Washington State Supreme Court was the question of which party, the United States or the mortgagor-corporation, was the "buyer" under Washington law upon whom the legal burden of the sales tax fell. The appellants there argued that the United States, as such, was the "buyer", and seem to persist in that argument before this Court, at least in their statements of the questions presented. However, (with

the possible exception of Cause No. 851) none of the appellants make any further attempts to demonstrate that the question of a sale to the United States is presented. And, as we shall show, no such question can realistically be said to be presented.

In the opinion below the State Supreme Court held that, as a matter of state law, the taxable buyer, *i.e.*, the person who must pay the tax to the state, is the person who is obligated to pay the purchase price to the seller. The State Supreme Court then applied this holding to the facts of this case, and concluded that the mortgagor-corporation, and not the United States, was the buyer. This conclusion was based upon the fact that the mortgagor-corporation alone had a contractual obligation to pay the seller, for the construction, the United States being obligated by virtue of its guarantee (Ex. 15) only to make mortgage payments after the construction is completed and after the sellers had been completely paid for the construction. (See Appendix A to each Jurisdictional Statement, pp. 6-10.)

These conclusions of the State Supreme Court follow precisely the analysis made by this Court in *Alabama v. King & Boozer*, 314 U.S. 1. In that case, a private contractor, was constructing an army camp under a "cost plus" contract. The taxpayer, *King & Boozer*, furnished lumber to the contractor. Alabama contended that there was a sale of the lumber to the private contractor and not to the United States, which was by contract obligated to reimburse the contractor for the purchase price of the lumber,

including the state sales taxes. The United States, which was a party to that proceeding, conceded that the constitutional immunity of the federal government from state taxation could not be invoked merely because the economic burden of the tax was to be ultimately borne by the federal government under the reimbursement provisions of the contract. However, the United States argued that under contract provisions, whereby title to the lumber passed to the government on shipment by the seller and whereby the government made the decisions of whether to buy, what to buy and at what price, the buyer was the government itself; and that therefore, under an Alabama law which placed the legal incidence of the tax upon the buyer, the legal as well as the economic incidence of the tax was upon the government. This Court rejected the contention of the United States, stating as follows:

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller who is required to 'add to the sales price' the amount of the tax * * * collected, [Note the exact parallel with RCW 82.08.050 and 82.08-.120 *supra*] * * * *Who*, in any particular transaction like the present, *is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority.* But it seems plain, as the Government concedes and as we assume for present purposes, that *under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured*

by the sales price is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. [Note also the parallel here to the decision of the Washington Supreme Court in the opinion below.] The Government's contention is that it has a constitutional immunity from state taxation on its purchases and that this was sufficiently a Government purchase to come within the asserted immunity.

"As the sale of the lumber by King and Boozer was not for cash the *precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity.* * * *" *Alabama v. King & Boozer, supra*, 314 U.S. 1, at pp. 9 and 10. (Emphasis supplied.)

Likewise, the precise question presented to the Washington State Supreme Court below was whether the federal government became obligated *to pay* the *seller* (*i.e.*, the appellant-contractors) the purchase price or selling price. And the State Supreme Court held that obviously the federal government was not so obligated, since the government's obligation to make payment extended only to the financial institution which made the loan to the mortgagor-corporation.

II.

WHETHER OR NOT THE MORTGAGOR-CORPORATIONS ARE FEDERAL INSTRUMENTALITIES IS NOT A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW BY THIS COURT

A. The Decision Below Is Clearly Correct, and Is Not in Conflict With Any Decisions of This Court

Since the sales in question were made to the mortgagor-corporations and not to the United States the question arises as to whether or not these corporations are tax exempt federal instrumentalities. Appellants each attempt to show that the decision below on this question is in conflict with certain decisions of this Court. Such attempts founder principally upon two points which all the appellants overlook, and which should be carefully noted before taking up individaully the cases cited by appellants.

The first point is one already touched upon; namely, that the mortgagor-corporations are not able to obligate the credit of the federal government, by acting as a kind of federal purchasing agent and thus obligating or spending government funds. Indeed, one of the purposes of the mortgagor-corporation is to insulate the United States from being directly obligated to pay the purchase price of the construction to the sellers; *i.e.*, the appellants, by having the mortgagor-corporation rather than the United States be the buyer obligated to pay the seller. (See Article 3, para. 4 of Exhibit 8; para. 14 of the

Housing Contract, Exhibit 8; Article 4, para. 7 of Exhibit 8; and para. 1(e) of Exhibit 1. Also see *United States ex rel. Miles Lumber Company v. Harrison & Grimshaw*, 305 F. 2d 363, and legislative history cited therein.)

The second point is this: these mortgagor-corporations were incorporated by the appellants in Delaware, were capitalized by the appellants, were qualified to do business as private corporations in Washington, and had only private parties as officers, incorporators, and stockholders. But even more importantly, these corporations were formed by the appellants *for their own purposes*; *i.e.*, as part of the financial arrangements which the *appellants themselves* made in order that the appellants might construct the Capehart housing and enjoy a profit therefrom. The appellants, and not the United States, made the necessary arrangements for obtaining a loan from a private lender to finance the construction, such arrangements including the formation of the corporation to which the loan was to be made. The United States merely set out the framework within which the financing arrangements were to be made and executed the guaranty to the lender, after all the other financing arrangements had been taken care of by the appellants themselves. And certainly every single step in these arrangements, including formation of these corporations, was taken by the appellants for their own purposes, and not merely for the purposes of the United States.

With these two points in mind, we may now

consider briefly the principal decisions of this Court cited by appellants; viz., *Clallam County v. United States*, 263 U.S. 341, (1923); (a property tax case) *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110; (a sales tax case) and *United States v. Livingston*, 179 F. Supp. 9; aff'd 364 U.S. 281, 4 L. ed. (2d) 1719 (also a sales tax case).

In *Clallam County, supra*, the corporation in question was organized by the United States, capitalized by the United States, managed by the United States, served the direct war-time purpose of only the United States, and was owned entirely by the United States, except for seven shares held by trustees for the United States. The distinction between that case and the instant case is obvious.

Kern-Limerick v. Scurlock, supra, is not helpful to appellants here because the agent or instrumentality of the federal government in that case was able to do what the mortgagor-builder corporation in the instant cases cannot do; viz., bind the federal government on a direct obligation to seller. In the *Kern-Limerick* case the federal government had apparently learned the lesson taught it by the *Alabama v. King & Boozer* decision, and had put into the sales contracts in the *Kern-Limerick* case the provision that the United States would be directly obligated to the seller. A similar provision is completely absent in the instant cases for the simple reason that the purpose of the Capehart Act is to prevent the United States from being directly obligated for the cost of construction.

The *Livingston* case is inapplicable for the same reason as in *Kern-Limerick, supra*. In the *Livingston* case the federal district court relied specifically upon this Court's decision in *Kern-Limerick*, and thus held that the United States was directly obligated to the seller. A brief review of the facts in the *Livingston* decision makes this point abundantly clear. Thus, from the facts of the *Livingston* decision it will be observed that the detailed contract between DuPont and the Atomic Energy Commission provided for a revolving fund to be deposited by the government with banks designated as depositaries of public moneys from which DuPont could draw for all of its costs and expenses, including cost of purchases by DuPont.

> "In Kern-Limerick there was a substantial question of the authority of the contracting officers to constitute the contract or with a purchasing agent of the government, but there is no such question here. This appears to be the sort of contract Congress had in contemplation in 1946 when it considered the role of American industry in the Nuclear program. * * *"
>
> "This type of contract, and the substantive relation of the parties, made it all the more appropriate that the contract require that title to all goods and materials purchased should pass directly from the vendors to the United States. DuPont's credit was not to be advanced or risked. Its disclosures in its requests for quotation and its purchase orders that the goods were being procured for the United States, to whom title would directly pass, and its imposition of the terms required of public contracts with the United States, negatived any individual liability of its own. *What obligations did arise*

from the purchase orders were discharged by drawing directly upon public funds." (Emphasis supplied.) *United States v. Livingston*, 179 F. Supp. 9 at p. 21.

The *Livingston* case is also distinguishable because the taxpayer there; viz., DuPont Company, in operating as the contractor of the Atomic Energy Commission, had as its sole and exclusive purpose the serving of the United States, without the purpose of gain to either itself or any other private party. In contrast, in the instant cases the mortgagor-corporations, during the time of construction, do not serve merely the interests of the United States, but the financial interests of the Appellants as well.

B. There Is No Disparity in Opinions of the Supreme Courts of the Several States

Appellants each suggest that this Court should note jurisdiction because of an alleged divergence between the opinions of the Supreme Court of the State of Washington in the instant cases, and those of the Supreme Court of the State of Florida and the Supreme Court of the State of Michigan, in *Green v. Elgin AFB Housing*, 104 So. (2d) 463, and *Knapp-Stiles, Inc. v. Michigan Department of Revenue*, 370 Mich. 329, 122 N.W. (2d) 642 (1962).

A divergence of opinions among the state courts would not necessarily present a substantial question. Moreover, an examination of the opinions said to be in conflict reveals that in fact there is no conflict at all.

The Washington court's majority opinion correctly distinguished both the Florida and Michigan decisions, stating they were based upon interpretations of state exemption statutes much broader than that demanded by the Federal Constitution.

In *Green v. Elgin AFB Housing*, *supra*, the Florida court specifically noted that the case involved a statutory exemption much broader than that required by the Federal Constitution, the exemption applying to sales of tangible property to contractors who, pursuant to government contract, put such property into public works.

In *Knapp-Stiles, Inc. v. Michigan*, *supra*, the Michigan court construed a similar state exemption to reach a conclusion identical to that in Florida. In *Knapp-Stiles* the exemption from the sales tax was applicable simply because the United States was a party to the housing contract.

S.S. Silberblatt, Inc. v. Tax Commission of the State of New York, 5 N. Y. (2d) 635, 159 N.E. (2d) 195, cert. den. 361 U.S. 912 (1959), is the only decision of any other state supreme court which directly determines whether a mortgagor-corporation in a Capehart transaction is to be considered a federal instrumentality. The decision of the Washington Court in these cases is completely consistent with the decision of the New York Court of Appeals. In *Silberblatt, Inc. v. New York*, *supra*, on facts directly in point with the essential facts of this case, the New York Court held that a mortgagor-builder cor-

poration is not an instrumentality of the United States. Accordingly, the New York Court refused to abate assessments of mortgage recording fees on the mortgages, identical for all intents and purposes to those involved here, which were executed by the mortgagor-corporations in anticipation of construction of Capehart housing by builder corporations situated identically to the Appellants in these cases.

The New York Court of Appeals decision is directly in point on the question of whether or not the mortgagor-builder corporation is an instrumentality of the federal government. Contrary to the several assertions of the several Appellants, no other state supreme courts other than New York and Washington, which are in accord, have ruled with respect to this question.

The New York Court of Appeals said:

> "The appellant's contention that this petitioner and the five corporate mortgagors are instrumentalities of the Federal Government or its agencies and, as such, are exempt from State and local taxation, is without substance. * * * At the time of the execution, delivery and recording of these mortgages, each of the mortgagors was a private corporation, all of the capital stock of which was privately owned. They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They pos-

The United States Supreme Court, despite the urgings of the Solicitor General of the United States (see 361 U.S. 802, requesting a brief from the Solicitor General, and the brief filed in response thereto), allowed the decision of the New York Supreme Court to stand. See 361 U.S. 912.

> sessed all of the requisites and responsibilities of corporate existence and, as such, are an entity separate and apart from the United States, (United States v. Strang, 254 U.S. 491 * * *) and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government. (Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U. S. 549, * * *) * * *"
> *S. S. Silberblatt, Inc. v. New York*, 159 N. E. (2d) 195 at p. 198.

C. The Lower Court's Decision Is Consistent With Federal Decisions Involving Capehart Housing

It is significant that appellants have cited no federal district court or court of appeal decisions to support their contentions. For, in fact, recent federal court decisions support the Washington State Supreme Court's determination that the mortgagor-builder corporations were not federal instrumentalities when the sales were concluded. For instance, the Federal District Court in *United States v. Ft. George G. Meade, Etc.*, 186 F. Supp. 639 (1960), held the leasehold interest held by the mortgagor-corporation to be subject to the mechanics' lien law of Maryland. This could hardly follow if the mortgagor-builder corporations were truly instrumentalities of the United States. The Federal District Court stated:

> "* * * The cases cited by him (the Maryland Judge) fully support his conclusion that the so-called Capehart Act contemplates leaving the entire arrangement for the financing and construction of Capehart housing projects in the hands of private enterprise until the point

> at which the government has secured the capital stock of the Housing Corporation and that, as the land in question was leased to a private corporation, its leasehold interest is subject to the mechanics' lien law of Maryland. * * *"
> *United States v. Ft. George G. Meade, Etc.*, 186 F. Supp. 639 at p. 646.

In the *United States ex rel. Miles Lumber Co. v. Harrison and Grimshaw Construction Co.*, 305 F. (2d) 363 (1962) cert. den. December 3, 1962, 371 U.S. 920, the Federal Court held that the Capehart Act Project is not a public work for purposes of the Miller Act, 40 USCA, § 270 and § 270b. The court there observed that the eventuality that all of the stock of mortgagor-corporations will vest in the United States does not make the project a public work, or the mortgagor corporation a public corporation at the time of construction. Moreover, the court found, the fact that the mortgagee and the mortgagor, rather than the United States, are obligees on the performance bond shows the private nature of the construction. The court also noted that the Capehart Act Amendments to the National Housing Act were for the purpose of providing "the most practicable means of coping with the various serious housing problems * * * facing our military services."

> " * * * While conceding the advantages of the use of appropriated funds, Congress 'recognized that budgetary considerations would not permit the expenditure in one or two fiscal years of the sums needed,' and accordingly provided for 'the utilization of private mortgage capital to be repaid from quarters allowances

of eligible service personnel. * * * " (Citing House Report No. 2363, June 15, 1956, to accompany HR 11742, 84th Cong. 2nd Session. 3 US Code Congressional and Administrative News, 1956, pages 4509, 4546."

The court concluded,

"We are confronted here with a situation in which the project is built by a private entity with private funds at private risk. The property is encumbered by a mortgage given by a private mortgagor to a private mortgagee. Those furnishing labor and materials during project construction may assert liens under state law against the property. The eventuality that title will vest in the United States does not make the project a public work. * * * " *United States ex rel. Miles Lumber Co. v. Harrison Grimshaw*, 305 F. (2d) 363 at pp. 365, 366.

D. The Question of Whether Or Not the Mortgagor-Corporations Are Federal Instrumentalities Is Not Substantial As a Matter of Public Importance

It is significant that the issue of whether or not the mortgagor-corporations under the Capehart Act are federal instrumentalities for purposes of exemption from state taxation has been raised and squarely ruled upon only in two decisions: this decision of the Washington State Supreme Court, and the decision of the New York Court of Appeals in *Silberblatt, Inc. v. New York*, 5 N.Y. (2d) 635, 159 N.E. (2d) 195, cert. den. 361 U.S. 912 (1959). Thus, since the beginning of the Capehart program approximately eight years ago, the issue seems to have been of no widespread importance.

One possible reason for this fact may be that in very few cases would there be any likelihood of a

tax falling directly upon the mortgagor-corporation. The New York mortgage-recording tax involved in *Silberblatt* is one such instance, but apparently few, if any, other states in which Capehart Housing has been constructed have a similar tax. The Washington State sales tax is another such instance, but appellees have found no other state which has the two factors in its sales tax law which result in the tax being imposed upon the mortgagor-corporation. These two factors are, of course, the fact that in Washington the tax is imposed upon the purchaser, and the additional fact that construction itself is defined as a retail sale. Absent either factor, the lawsuits giving rise to these appeals would never have taken place.

In short, it seems most unlikely that the issue of the nature of the mortgagor-corporation will be of any more widespread significance in the future than it has been in the past.

CONCLUSION

For the reasons given above, appellees respectfully submit that each of these appeals should be dismissed for want of a substantial federal question.

Respectfully, submitted,

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